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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WYMAN-GORDON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT AND CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

In opposition and cross-petition for certiorari, Quentin O. Young, attorney for Wyman-Gordon Company *et al.*, answers the petition of the Solicitor General on behalf of the National Labor Relations Board for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, and respectfully cross-petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit on the merits of the case involved.

Opinions Below.

The opinion of the Court of Appeals (Petitioner's App. A, pp. 1a-12a) is not yet officially reported. The opinion of the District Court (R. 118-124)[1] is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arises (R. 11-13), is not officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 12, 1968 (Petitioner's App. B, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the National Labor Relations Board violated the Administrative Procedure Act in its promulgation of the *Excelsior* rule.

2. Whether the Board may seek the assistance of a Federal District Court in obtaining the list of names and addresses required under the *Excelsior* rule.

3. Whether the Board's *Excelsior* rule is invalid because of the Board's failure to comply with the Administrative Procedure Act (5 U.S.C. c. 19, § 1001 *et seq.*).

4. Whether the *Excelsior* rule constitutes an invasion of the right of privacy of the employees of the Company.

5. Whether the *Excelsior* rule is contrary to the decisions of the Courts, including the United States Supreme Court, and is inapplicable in the present case inasmuch as

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[1] "R." refers to the record appendix, a copy of which has been filed along with the petition.

the unions had adequate access to the employees, their names and their home addresses.

A. Whether the Board's conclusion in *Excelsior* is contrary to Court decisions.

B. Whether the unions had adequate means and alternative methods of ascertaining the employees' names and addresses.

6. Whether the *Excelsior* rule is illegal inasmuch as it promotes an invalid dual standard of conduct between employers and employees.

7. Whether the *Excelsior* rule is a violation of section 8(a)(2) and section 302 of the National Labor Relations Act as amended.

8. Whether the subpoena, the subject of this proceeding, calls for the production of records exceeding the Board's and the Court's statutory authority, and is not supported by section 11 of the Act.

Statutes Involved.

The relevant statutory provisions are set forth in Petitioner's Appendix D, pp. 34a-39a.

Statement of Facts.

On July 12, 1966, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Boilermakers"), filed a petition with the First Region of the Board, claiming that they represented a majority of the defendants' employees and requesting that an election be held by

the Board to ascertain whether or not they did, in fact, so represent a majority (Board's Exhibit A, R. 9 *et seq.*).

On August 26, 1966, a formal hearing was held on the Boilermakers' petition; and at this hearing the United Steelworkers of America, AFL-CIO, intervened (R. 11). On September 6, 1966, the Regional Director of the First Region directed that an election be held to determine whether the employees of the defendants desire to be represented by the Boilermakers, by the Steelworkers or by neither union (R. 13).

During the course of the hearing on August 26, the defendants, by counsel, advised the Board that in their opinion the requirements of the *Excelsior* case were invalid and that the Board was without justification to require the defendants to produce a list of the names *and addresses* of its employees wherein the sole purpose of supplying such a list was that the list could be transmitted to the unions to aid and abet them in organizing the defendants' employees.

Pursuant to the direction of election, an election was held on September 29, resulting in the following tally of ballots:

Approximate number of eligible voters	1,750
Void ballots	10
Votes cast for petitioner	226
Votes cast for intervenor	555
Votes cast against participating labor organizations	903
Valid votes counted	1,684
Challenged ballots	6
Valid votes counted plus challenged ballots	1,690

Thereafter, within the prescribed time limitation, both the Steelworkers and the Boilermakers filed objections to

the election, based upon the defendants' failure to comply with the *Excelsior* list. On October 19, 1966, the Regional Director upheld these objections.

Thereafter the Board denied the defendants' request for a review of the Regional Director's findings on these objections (R. 39). Finally, on December 29, 1966, the Board issued its subpoena requiring the defendants to produce the aforementioned list of names and addresses of its employees (Board's Exhibit G, R. 42).[2]

Argument.

The Board, in its petition, misconstrues the Circuit Court's application of *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194.

In that case the Supreme Court found that an administrative agency could retroactively establish a new rule through the adjudicatory process when the decision was between an agency and an individual party. In the instant proceeding the Board did not apply its *Excelsior* rule to the Excelsior Corporation but made it effective thirty days subsequent to establishing the *Excelsior* rule. It is in this area that the Board's brief miscontrues the effect of *Excelsior* on the instant proceeding, as Judge Aldrich states in his decision below:

> "In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recog-

[2] The remaining facts are adequately set forth in the Petition for Certiorari.

nized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rule-making procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the 'rule' was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

"In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. Chenery in no fashion, suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress." *Wyman-Gordon* v. *National Labor Relations Board*, 68 L.R.R.M. 2483 at 2485.

Moreover, the Board knew, in effect, that it was establishing a new substantive rule of law when it invited certain trade associations and labor unions to file amicus briefs before it.

The other cases cited by the Board in regard to the promulgation of an administrative rule are equally inapposite to the present situation inasmuch as they involve situations wherein an administrative agency has ruled against a specific party and has attempted to establish a rule prospectively.

The respondent petitioner respectfully cross-petitions for a writ of certiorari to review the Board's authority to issue the *Excelsior* decision, because of its importance in the interpretation of the National Labor Relations Act, as amended, and the authority of the Board to issue decisions of this nature.

It is submitted that no single issue to come before the Board in recent years has been the subject of so much litigation as has the Board's *Excelsior* decision, nor have the Courts issued such conflicting decisions in their examination. See Appendix.

I.

The Board's Excelsior Rule is Invalid because of the Board's Failure to Comply with the Administrative Procedure Act (5 U.S.C. C. 19, § 1001 et Seq.).

In establishing the *Excelsior* rule the Board has clearly circumvented the requirements of the Administrative Procedure Act. Indeed, the Board recognizes this fact and attempts to justify its actions on the ground that it permitted certain associations of employers and certain labor unions to intervene in the *Excelsior* case and to file briefs and make oral arguments therein.

It is respectfully submitted that the Board's procedure in *Excelsior* completely fails to comply with the requirements of the Administrative Procedure Act. Again, in a most unprecedented manner, the Board decided that the rule announced in *Excelsior* would not be made retroactive so as to be applicable to the *Excelsior* case itself, but would become effective thirty days after the publication of the *Excelsior* decision. (*Cf.* Siegel, Bureau of National Affairs Daily Reporter, No. 222; 11-15-67.)

From these two factors alone, it is clear that the Board recognized that it was establishing a new rule or procedure

in the conduct of election proceedings under Section 9 of the Act. However, despite this lip-serving attention to the provisions of the Administrative Procedure Act, there can be no question that the Board has failed to comply with the requirements established by Congress for Administrative Agencies in establishing rules and regulations.

Section 2(c) of the Act defines a rule or a regulation as follows:

> "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

Sections 3 and 4 in pertinent part provide the method by which rules and regulations are to be promulgated by administrative agencies:

> "Every agency shall separately state and currently publish in the Federal Register . . . (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public . . .
>
> "(a) General notice of proposed rule making shall be published in the Federal Register . . . and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> "(b) After notice required by this section, the agency shall afford interested persons an opportunity

to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . .

"(c) The required publication of service of any substantive rule . . . shall be made not less than thirty days prior to the effective date thereof . . ."

In the course of its promulgation of the *Excelsior* rule, it is clear that the Board has never published the rule in the Federal Register nor provided interested parties with an opportunity to present their positions to the Board before the rule becomes effective. The Board cannot and does not claim that the *Excelsior* rule in any way followed the requirements of the Act as set forth herein. Indeed, the fact that it did permit certain trade associations and certain labor organizations to intervene in the proceedings is a clear indication that they have denied to other persons interested their right to present their views in full. It is respectfully submitted that this Court must dismiss the present Complaint because of the Board's failure to comply with the required provisions of the Administrative Procedure Act (*cf. Wyman-Gordon* v. *National Labor Relations Board, supra*).

II.

The Excelsior Rule Constitutes an Invasion of the Right of Privacy of the Employees of the Company.

The Board's stated purpose of espousing the *Excelsior* rule is to turn the list of the names and addresses of the employees over to the union or unions involved so that the

unions may directly contact the employees either by mail, by telephone, or by personal visits to the employees' homes.

The idea that an employer must give to strangers the names and addresses of his employees is repugnant to our democratic right of privacy. The Board's statement that its policy is based upon a desire that both sides be given an opportunity to present their positions is patently absurd and begs the question of its companion argument that the purpose of the lists is to minimize challenges at the time of the election. The statute is barren of any requirement of the nature of the *Excelsior* case.

The Supreme Court in *Griswold* v. *State of Connecticut*, 381 U.S. 479, 484-485 (1965), strongly protested the invasion of an individual's right of privacy. It said:

> "The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U. S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp* v. *Ohio*, 367 U. S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' "

The Board's desire to irresponsibly publish the names and addresses of the employees is in direct conflict with the holding of the United States Supreme Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 462 (1958), wherein the Court said:

> "We think that the production order [for the names of the members of the NAACP in Alabama] . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

It should be remembered that in the *Alabama* case the list of names and addresses was to be turned over to the state Attorney General for his use, and his use only. Certainly, it is a far cry from that situation to the situation where the Board intends, and proudly proclaims, that it will turn over the list to union officials for whatever purpose they seek to obtain.

One of the major bases upon which the Board founds its *Excelsior* decision is the fact that the giving of such lists will assist the Board and the parties to the election, in resolving the eligibility of the employees to vote. The Board has for a long period of time required the employer, several days prior to the election, to submit to it a list of eligible voters. This list is then reviewed by the union or unions involved to determine whether the list is correct. The Board admits that on September 26, 1966, the employer did in fact submit such a list to the unions involved and the list was thoroughly reviewed by representatives of both unions (R. 36). However, the Board would have the Court believe that this is insufficient and that failure to supply to the unions both names and addresses of employees will cause numerous challenges when employees exercise their right to vote. This is a completely false and unwarranted assumption and is denied by the Tally of Ballots. The Tally indicated that of a total number of eligible voters of some 1,750, there were exactly 6 challenges. The number of ballots that were challenged in the election of September 29 amount to less than .05 per cent. It is clear, therefore, that the challenged ballots could in no way affect the results of the election; and it is further clearly demonstrated that the Company's failure to supply the *Excelsior* list in no way affected the number of challenges in the election.

III.

The Excelsior Rule is Contrary to the Decisions of the Courts, Including the United States Supreme Court, and is Inapplicable in the Present Case inasmuch as the Unions had Adequate Access to the Employees, their Names and their Home Addresses.

A. The Board's Conclusion in Excelsior is Contrary to Court Decisions.

In *Excelsior* the Board has adopted a doctrine that cannot withstand the thrust of decisions of the United States Supreme Court, presuming an imbalance of communication between an employer and the union or unions seeking to represent employees. The Board in *Excelsior* has determined that it is necessary that the unions be supplied with the names and addresses of employees.

This Court has consistently held that a union does not have, except in unusual circumstances, such a right of communication. In *National Labor Relations Board* v. *United Steelworkers of America CIO* (NuTone, Inc.), 357 U.S. 357 (1958), the Court clearly upheld the principle that a union does not have a statutory right under the provisions of the Act to distribute union literature on company time and on company property. In order to establish such rights, the Court held that it had to be affirmatively shown that an employer's rule barring such activity actually limited or reduced the union's ability to campaign among the employees.

> "Of course the [employer's] rules had the effect of closing off one channel of communication [to the union]; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of

every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.*, v. *Labor Board*, 197 F. 2d 640, 646 [30 L.R.R.M. 2305]; *Labor Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 [34 L.R.R.M. 2293] (concurring opinion). No such mechanical answers will avail for the solution of this non-mechanical complex problem in labor-management relations. If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules. The Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it adduced, the concrete basis for appraising the significance of the employer's conduct is wanting [42 L.R.R.M. 2327]."

Earlier, this Court had established this principle in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Here, in determining the area of assistance which an employer may or may not give to a union, the Court said:

"This is not a problem of always open or always closed doors for union organization . . . *The employer may not affirmatively interfere with organiza-*

tion; the union may not always insist that the employer aid organization." (Emphasis added.)

Two Court of Appeals decisions are most significant and most applicable to the present situation.

In *May Department Stores* v. *National Labor Relations Board*, 316 F. 2d 797 (C.A. 6, 1963), the Court of Appeals overruled a decision of the Board wherein the Board had found that a union was entitled to equal time on company property to respond to noncoercive yet strongly anti-union employer's speeches. The Court found that the Board had not established the nonaccessibility of the employees, and therefore the unusual remedy sought to be established by the Board could not stand the test of the Supreme Court decisions *supra*.

The Court said at 801:

> ". . . neither the use of the magic word 'imbalance' nor the characterization of alternative avenues of communication as 'ineffective' . . . can give the Union a right of access which the Supreme Court of the United States has refused to recognize and which it does not possess."

In a similar vein, the Tenth Circuit, at an earlier date, denied the right of a union's access to channels of communication other than those that are normally available. *Cf. National Labor Relations Board* v. *Seamprufe, Inc.*, 222 F. 2d 858 (C.A. 10, 1955).

In affirming the *Seamprufe* approach in this attempt to rationalize an excessive right of communication, this Court, in *Babcock & Wilcox, supra*, stated at page 112:

> "It is our judgment, however, that an employer may validly post his property against non-employee distri-

bution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message* and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." (Emphasis added.)

In the instant case there has been no finding that there was a lack of accessibility to the two unions involved towards the employees of the employer. Indeed, no such contention is made by the Board, nor can it be made. As a matter of actual practice, the Board included in its Direction of Election a demand that the *Excelsior* list be supplied. (*Cf.* Exhibit B, R. 13.) This automatic application of the *Excelsior* rule is in defiance of the decisions of the Supreme Court cited herein.

B. The Unions had Adequate Means and Alternative Methods of Ascertaining the Employees' Names and Addresses.

The election conducted on September 29, 1967, was the fifth such election in which the Boilermakers had sought to gain recognition of the Company's employees (R. 118). During this period of time, the Boilermakers have constantly maintained an office and a staff in Worcester, Massachusetts. They have consistently subjected the Company's employees to organizational campaigns and requests for membership in their union. It would be completely naïve to presume for a moment that the Boilermakers dur-

ing this period of time could not have established contact with each and every employee of the Company.

Over the course of the years, the Boilermakers, in addition to the usual organizational activity of distributing handbills and leaflets at the Company gates, have had innumerable meetings in and around Worcester. During past organizational campaigns, the Boilermakers have printed ads in the local Worcester newspapers. They have broadcast radio appeals on the local Worcester radio stations. In fact, during one campaign they published a telephone number which could be called by the employees of the Company to receive propaganda appeals during the day and night. This so-called "hot line" was carried out over an extended period of time and with full knowledge not only of all Wyman-Gordon employees but indeed of all the citizens of the Worcester area. Upon such a showing of ingenuity and initiative, it ill becomes the Board at this date to state that it is necessary that the Boilermakers receive from the Company a list of the names and addresses of the Company's employees.

In regard to the Steelworkers, and with equal application to the Boilermakers, there is available to anyone with the initiative to do so a City Directory of Metropolitan Worcester area. This Directory can be purchased by anyone who desires to do so or it can be inspected in the Worcester public libraries by anyone who does not wish to pay the purchase price.

The City Directory lists all individuals living in metropolitan Worcester and indicates not only their home addresses but also their employer and the position which they hold with the employer (Exhibit B, R. 55).

It is clear from the foregoing that the unions here had available to them sufficient sources of information in order to actively affect the type of campaign which the Board

contemplates under the *Excelsior* rule. The failure of the unions to make use of these readily available, and varied and multiplicity of approaches does not warrant the implications imposed upon the employer in *Excelsior*.

IV.

The Excelsior Rule is Illegal inasmuch as it Promotes an Invalid Dual Standard of Conduct between Employers and Employees.

The Board dwells at great length on the value of the *Excelsior* rule in promoting better understanding of the issues involved in a union election. It indicates that the *Excelsior* rule will facilitate a union in its communications with employees by mail, by telephone, and finally by visits to the employees' homes.

The Board fails to give the Court a proper picture of the situation as it exists as a result of the Board and Court decisions between the rights, privileges and obligations of a union against the rights, privileges and obligations of an employer.

In an organizational campaign, a union has an absolute right to make any promises of benefits that it allegedly can gain from the employer. It has a somewhat limited but a very real right of harassment and coercion in obtaining employees' signatures on membership cards.

In contrast to this, an employer is under a statutory admonition proscribing such activities as promises, threats or coercion (*National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); *National Labor Relations Board* v. *Bailey Co.* (C.A. 6), 180 F. 2d 278 (1950)). Indeed, it has now become a *per se* violation of the Act for an employer to visit the homes of his employees and to discuss

union matters and union organizational activities (*Peoria Plastics Co.*, 117 N.L.R.B. 545 (1957)). It is an unfair labor practice for an employer to ask an employee whether or not he belongs to the union. It is an unfair labor practice for an employer to discuss union activities in the "Boss's office" (*cf. General Shoe Corporation*, 77 N.L.R.B. 124 (1948); 97 N.L.R.B. 499 (1951); *National Caterers of Virginia*, 125 N.L.R.B. 110 (1959)).

In promulgating the *Excelsior* rule, the Board in its militancy seeks to further the advocacy of unionism without justification or foundation in statutory authority given to it by Congress.

V.

The Excelsior Rule is a Violation of Section 8(a)(2), and Section 302 of the National Labor Relations Act as Amended.

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) reads as follows:

> "It shall be an unfair labor practice for an employer—
>
> ". . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Over the course of the years, the Board has consistently been zealous in prosecuting employers who show favoritism towards one union as against another or have in any way assisted a union in organizing its employees where only one union was involved. Its approach to these situations stems from the foregoing provisions of Section 8(a)(2) of the Act.

In 1961, in *A. O. Smith Corp.*, 132 N.L.R.B. 339, 48 L.R.R.M. 1340, 1343, the Board specifically stated:

> "We agree with the Trial Examiner that this act by the Company (furnishing employees' names and addresses to a Union) constituted illegal assistance."

The Board's ruling in that case was ultimately upheld by the Seventh Circuit, 343 F. 2d 103, 114 (1965). A similar conclusion was reached by the Ninth Circuit in *National Labor Relations Board* v. *L. Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 734, in which the Court said:

> "Respondent's furnishing of a list of the names and addresses of its employees to the District Council of Carpenters (AFL) was an illegal act of assistance under § 8(a)(2) of the Act."

To the same accord see—

Hershey Metal Products Co., 76 N.L.R.B. 695, 21 L.R.R.M. 1237 (1948).

Wagner Iron Works, 104 N.L.R.B. 445, 32 L.R.R.M. 1104 (1953).

National Labor Relations Board v. *Wagner Iron Works & Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL)* (C.A. 7), 220 F. 2d 126 (1955).

The effect of the Board's ruling in *Excelsior* and the continuing impact of the foregoing cases appears to place the Board in a completely incongruous dilemma. It is illegal and a violation of Section 8(a)(2) of the Act for an employer voluntarily to assist a labor organization by giving to it the information called for in *Excelsior*. However, if

the Board sees fit to order such information to be given to the union, by some mystical wave of the wand, such information and assistance no longer violate Section 8(a)(2) of the Act. In effect, it is illegal for an employer to give this information on Monday and it is illegal for an employer not to give it on Tuesday.

In amending the National Labor Relations Act of 1947 (Taft-Hartley Act), Congress was seriously concerned about payments made by employers to representatives of their employees or to individuals seeking to obtain a representative position. As a result of this concern, it enacted Section 302 of the Act, which in pertinent part reads as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> "(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> . . . . . .
>
> "(b)(1). It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a).
>
> . . . . . .

"(d) Any person who willfully violates any of the provisions of the section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both." (29 U.S.C. § 186.)

From the statutory language it is clear that the giving of a thing of value constitutes a criminal act under Section 302(a), and further that anyone who demands a thing of value from an employer for the use of any representative of his employees or any individual seeking to represent his employees comes in direct conflict with the criminal provisions of the Act (Section 302(b)(1)).

During the investigation of the objections to the conduct of the subject election, the employer categorically stated that the giving of a list of the names and addresses of its employees to the Board, whose sole intention and purpose were to transmit said list both to the Boilermakers and to the Steelworkers, constituted a violation of the foregoing sections of Section 302 (R. 45). At that time the defendants requested the Regional Director to hold a hearing to resolve the issue of whether or not such a list constituted a thing of value. The Regional Director did not find it fit to hold such a hearing and, in effect, completely ignored this request.

When the Board, on December 27, 1966, served a subpoena duces tecum upon the defendants, the defendants then filed a motion to the Board requesting that the subpoena be quashed (Plaintiff's Exhibit H, R. 44). In this motion the defendants again alleged that the list was a thing of value within the meaning of Section 302. Again the defendants requested a hearing to determine whether or not the list constituted the giving of a thing of value, which

request was completely ignored by the Board (Exhibit A, R. 45).

It is, or it certainly should be, common knowledge of which the Court below could take judicial notice that a list of names and addresses of individuals—a mailing list—is a thing of value. Mailing lists are compiled by mail advertising houses and are used for the distribution of mail on behalf of their customers. There are other corporations and businesses who make a very active and successful business of merely compiling such lists and renting or selling them to mail advertising houses (Exhibit D, R. 76-118).

U.S. Representative Clement J. Zablocki, of the 4th District of Wisconsin, has been seriously concerned over the distribution of pornographic literature through the United States mails. Several years ago he submitted a bill in the United States Congress that, in effect, provided that all persons who deal in mailing lists must keep a record of the uses to which these mailing lists were used; if a list were rented or sold, the individual who possessed the list must retain a record of these transactions; and his record would be subject to inspection by the United States Post Office Department (Exhibit C, R. 61-75).

Again, in 1967, in the current session of Congress, Representative Zablocki submitted a substantially similar bill (Exhibit C, R. 73-75). In presenting his bill to Congress, Congressman Zablocki stated on the floor on February 9, 1967:

> "For example, in reviewing mailing list catalogues in my possession, I have found that a list of 918 pedigreed swine breeders can be had for $57.50, a list of 27 deaf missionaries for $8.00 and the names of 24 zwieback manufacturers for $10.50.
>
> "You may be pleased to know, Mr. Chairman, that $10.50 also will buy a list of 84 doughnut bakers living

in your home state of Connecticut. And that a Senator's name and address sells for about 15 cents, while a member of the House is only worth a nickel.

"If one so desires, he can obtain a list of 212,000 attorneys, 99,000 dentists, and 259,000 doctors—all for about $25 per thousand."

While Congressman Zablocki's purpose and intent is the elimination of pornographic literature from the United States mails, it is clear that a mailing list does constitute a "thing of value."

On September 24, 1966, the New Yorker Magazine, published by the New Yorker Corporation, New York City, New York, published an article directly dealing with the commercial nature of such mailing lists (see Exhibit D, R. 76-118).

There have been no Board or Court decisions as to whether or not a list such as the Board seeks here is a "thing of value." The issue is raised for the first time. If it is a thing of value, the action which the Board demands is clearly within the proscription of Section 302. Indeed, a question is raised as to whether the Board and its agents have not already violated Section 302(b).

It is no answer to the defendants' position that the unions would not sell this list. What the unions could or would do with it once it is beyond the employer's control is not a matter of issue before this Court. The sole problem that must be resolved is whether or not the list constitutes a thing of value; and, on this issue, the defendants have twice requested both the Regional Director and the National Labor Relations Board itself to hold a hearing to determine the validity of its purpose, and in each instance the defendants' request has been completely ignored. The

Courts, in construing Section 302, have clearly held that the proscription in Section 302 not only applies to the giving of money, but is applicable to "anything of value," and it is clearly applicable to both the employer and the employees' representatives. *Cf. United States* v. *Roth* (C.A. 2, 1964), 57 L.R.R.M. 2553, cert. den. 58 L.R.R.M. 2591, and its companion case, *United States* v. *Holt* (C.A. 2, 1964), 56 L.R.R.M. 2556. See also *United States* v. *Schabert* (C.A. 2, 1966), 62 L.R.R.M. 2571; *United States* v. *Ricciardi* (C.A. 2, 1966), 61 L.R.R.M. 2477; *United States* v. *Kramer* (C.A. 7, 1966), 61 L.R.R.M. 2234.

The District Court, in its opinion in the instant proceeding (R. 118-124), gave only cursory attention to the question of whether or not a mailing list was a thing of value. In response to an admission during oral argument by counsel for the Board, in which he admitted that a mailing list could be a thing of value, the Court said: "The possible value of such a list as a mailing list gives this contention some surface plausibility" (R. 124). The Court then dismissed this contention with a reference to *Zentner* v. *American Federation of Musicians of United States & Canada &c.* (S.D. N.Y. 1965), 237 F. Supp. 457.

It is submitted that the application of this decision to the present proceedings is inappropriate. The issue involved in *Zentner* was based upon the right of a union to have the names and addresses of all of its members as they traveled around the country in order that it might properly police its collective-bargaining agreements and wage standards.

It can readily be recognized that a union must have the names of its members in order to properly police and administer its own business, but it is submitted that no union is entitled to such information prior to the time when they are the recognized collective bargaining representative of

employees. Further, *Zentner* is inappropriate to the present proceeding.

VI.

The Subpoena, the Subject of This Proceeding, Calls for the Production of Records Exceeding the Board's and the Court's Statutory Authority, and is Not Supported by Section 11 of the Act.

The District Court in the instant proceeding erred in its assertion of jurisdiction under Section 11(2) of the Act (29 U.S.C. § 161(2)). It assumed that the subpoena issued by the Board required the production of testimony or evidence necessary to resolve the question as to whether or not either or both unions represented a majority of the defendants' employees.

The Board's error lies in the fact that the subpoenas here in question did not meet the statutory subpoena requirements as set forth in the Act, and further that the subpoenas were required to produce testimony or evidence necessary to resolve the problem presented to the Board.

The Board's authority to issue subpoenas permits the Board to issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence" (29 U.S.C. § 161 (1). See also 29 U.S.C. § 161(2), and 29 U.S.C. § 161(3)). It is submitted that, unless the Board can establish the necessity of the production of evidence or the submission of testimony touching the matter under investigation in order to resolve a factual issue, the District Court is without authority to enforce the Board's subpoena (see *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298; *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. 2d 450; *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692).

The Board has clearly indicated that the sole purpose of requiring the *Excelsior* list is for transmittal of these lists to the union or unions involved in a representation case. Where this is the avowed purpose of requiring the defendants to supply such a list, it is inconceivable that the Board or the Court can find jurisdiction for the production of such lists on the ground that they constitute evidence or testimony.

> "Evidence is a demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acception, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 31 C.J.S. "Evidence," § 2.

The gravamen of this situation is that the Board misconstrues its statutory authority under Section 11(2) and misconstrues the type of information to which it is entitled under the provisions of the Act.

In *Excelsior* the Board goes to great length in attempting to equate the right of a stockholder to obtain the names and addresses of fellow stockholders in the corporation. It finds in this area justification for its *Excelsior* decision. It has been acknowledged by the Courts, including the Supreme Court of the United States, that recognition must be given to the Board's "expertize" in matters pertaining to labor management relations. However, the Board's approach and argument, based upon a stockholder relationship, belies any expertize of the Board in the field of corporate law. The reason that an individual stockholder may obtain a list of all stockholders in the corporation is

based primarily upon the fact that a stockholder, no matter how small his holdings, is a partial owner of the corporation and as such has a right, both under common law and under statutory law, to know who his fellow stockholders are and to address them on any matter which he feels is of personal interest to them.

Again, the Board in *Excelsior* seeks sustenance to support its position on the ground that in a national, state or local election a candidate for office may secure the names and addresses of all registered voters. Presumably this is in order that the candidate can address the voters by mail, by telephone, or by personal visits. Going further, the Board again seeks support in the fact that a candidate for a union office is entitled to have the union distribute his personal campaign literature to all members. The Board's argument on both of these two issues is completely naïve and belies an "expertize" of the Board in these areas. The availability of a voters' list in a public election is a statutory right, and the requirement that a candidate for office in a union have a right to have the union distribute his literature for him is a statutory right.

In the present situation, the Board has not and cannot cite any provision in the Act which requires an employer to supply the information here requested by the Board, or indeed permits the Board to request such information.

The Board completely fails to understand or acknowledge the true nature of a subpoena and why subpoenas are necessary and vital. A subpoena has been described in the following language:

> "A 'subpoena' . . . is process, or a writ . . . for the purpose of compelling the attendance of a person whom it is desired to use as a witness . . . A writ which does not cause a witness to . . . give testimony . . . is not a subpoena." 97 C.J.S., "Witnesses" § 20.

"Generally speaking, a subpoena duces tecum may be issued to compel the production of any proper documentary evidence, such as books, papers, documents, accounts and the like, which is desired for the proof of an alleged fact relevant to the issue before the Court or officer issuing the subpoena. . . ." 97 C.J.S., "Witnesses," § 25e.

The Board has not urged and cannot urge upon this Court that the information they are presently seeking comes within the foregoing definition of a subpoena or the purposes for which a subpoena may be issued.

There can be no issue as to the purpose for which the Board seeks the names and addresses of the defendants' employees. It is clearly set forth in Board's Exhibit B (R. 11-13), in the following language:

"An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or before Sept. 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111.

There is no controversy involved which the Board seeks to resolve by its subpoena. There is no information that the Board seeks to obtain to assist the Board in the conduct of the election. As has already been pointed out, the Board's argument in regard to minimizing challenges during the course of the election is, in at least this proceeding, without a foundation in fact. Section 11 of the Act, upon which the Board bases its alleged claim to jurisdiction for itself and for this Court, reads in part as follows:

> "The Board . . . shall at all reasonable times have access to . . . evidence. . . . The Board . . . shall upon application . . . issue . . . subpoenas requiring the attendance and testimony of witnesses or the production of . . . evidence . . ."

Section 11(1) of the Act then discusses the areas in which the Board may properly issue a subpoena. In each instance, however, the right to issue a subpoena is based upon the necessity of the Board's ascertaining "evidence" or the necessity of the "production of evidence before the Board." Section 11(2), which grants District Courts of the United States "jurisdiction" to enforce Board subpoenas, again states emphatically that in the enforcement of such subpoenas the purpose is to afford the Board the right to produce "evidence" or to obtain "testimony."

The list which the Board is seeking here does not come, under any stretch of the imagination, within the terms of evidence or testimony.

The information which the Board solicits cannot aid or assist the Board in the determination of whether or not there is a question affecting interstate commerce. The sole purpose that the Board seeks the *Excelsior* list is to aid and abet the unions in their attempts to seek a representative status of the defendants' employees.

If the Board feels that the *Excelsior* lists are appropriate and necessary to the conduct of an election under the Act, its recourse is to the Congress of the United States and not to the District Courts.

The Board presumes that its request for enforcement of its subpoena, or, in the alternative, its request for the production of an *Excelsior* list, is mandatory upon the District Court. Here again the Board misstates the law. Section 11(2) of the Act merely states that the District Courts—

> "shall have jurisdiction to issue to such person [who has refused to comply with the Board's subpoena] an order requiring such person to appear before the Board, its member, agent, or agency, there to produce *evidence if so ordered,* or there . . . *to give testimony* touching the matter under investigation or in question." (Emphasis added.)

The District Court, the Board assumes, is to be nothing but a rubber stamp that must automatically enforce its subpoena. The Board gives no consideration to the fact that it is seeking an equitable relief. It ignores the fact that, in equity, it is asking the Court to exercise its discretion. While it is the defendants' position that the District Court had no jurisdiction based upon the foregoing statutory language to support the complaint, since neither testimony nor evidence is involved, it is still within the Court's discretion to determine whether or not it should in propriety sustain the Board's request.

The discretionary nature of the District Court's jurisdiction in the instant proceeding has been recognized in other cases involving *Excelsior* by District Courts in the United States.

In the first case to be presented to the Federal judiciary the Board sought, in an action identical with the present

action, to enforce its subpoena, or, in the alternative, to require the employer to submit names and addresses of its employees (*National Labor Relations Board* v. *Hanes Hosiery Div.* (U.S.) D.C. Middle District of North Carolina (Nov. 17, 1966), 63 L.R.R.M. 2513, reversed 66 L.R.R.M. 2264). In rendering his decision, Chief Judge Stanley held that the information which the Board sought in its complaint constituted neither evidence nor testimony, and therefore the Court was without jurisdiction to enforce the request of the Board. In the alternative the Court said:

> "In any event, if the Court has jurisdiction, it appears that the request of the plaintiff is directed to the sound discretion of the Court; and this Court, in the exercise of its discretion, is of the opinion, and so holds, that the subpoena should not be enforced."

In *National Labor Relations Board* v. *Montgomery Ward* (U.S.D.C. Middle District of Florida), 24 L.R.R.M. 2061, the Court came to a similar conclusion; and it specifically stated its agreement with Judge Stanley in the *Hanes* case. Specifically in regard to the question as to whether or not the Board's complaint called for the production of "evidence" or "testimony," the Court said at 2062:

> "I agree with Judge Stanley in the opinion that Section 162 of Title 29 of the United States Code vests this Court only with the authority to enforce a subpoena to produce evidence, or to require testimony, or to require attendance of a witness concerning an investigation or proceeding.
>
> "Now, this is not the purpose of this subpoena. There isn't a thing that the Board plans to do with it in conducting any investigation or any proceeding. All

the Board wants is acting as a conduit in handing it over to the Union, and I think, therefore, that it just does not—is not connected with an effort to secure evidence or testimony of a witness in connection with any matter that is under investigation."

In its conclusion, the Court stated:

"I think that then the matter is in the discretion of the Court and the request for injunctive relief should be and is hereby denied.

"Again, I repeat, this is not a ruling on the validity of the Excelsior Rule, and I specifically make that clear."

There are other cases in which District Courts have come to a different conclusion from the conclusion in the *Hanes* and the *Montgomery Ward* cases. In *National Labor Relations Board* v. *Wolverine Industries Division* (U.S. D.C. Eastern District of Michigan, 64 L.R.R.M. 2060) the Court clearly had a misconceived approach to the rulings of the National Labor Relations Board whereby an employer is proscribed from entering an employee's house to discuss union activities with him. In the course of its discussion of the issues the Court said at 2061:

"Of course, he can't turn his back to the boss if the boss comes to the home. . . ."

As indicated, supra, pp. 17-18, the "boss" is not permitted by the Board to go to the employee's home. The Court erroneously assumed that both the union and the employer had equal rights to visit the employees in their homes and equal rights in regard to promises, threats and coercions.

In other cases in which the *Excelsior* rule has been considered by District Courts, the Courts have assumed two basic principles which are erroneous: (1) that the production of the *Excelsior* list constitutes production of evidence or testimony within the meaning of Section 11(2) of the Act, and (2) that the requirement that an employer produce the names and addresses of his employees is within statutory authority of the Board. It is submitted on the basis of the foregoing that these two assumptions are clearly erroneous. *National Labor Relations Board* v. *Rohlen,* 64 L.R.R.M. 2168, affirmed 66 L.R.R.M. 2481. *Swift & Co.* v. *Solien,* 66 L.R.R.M. 2038. *National Labor Relations Board* v. *Beechnut Lifesavers, Inc.,* 66 L.R.R.M. 2327.

Conclusion.

It is respectfully submitted that this Court should affirm the Court of Appeals in holding the *Excelsior* rule invalid because of the Board's failure to comply with the Administrative Procedure Act, and further that this Court should review the entire case *de novo,* to resolve the issues presented by the extensive litigation as shown in Appendix.

Respectfully submitted,

HERRICK, SMITH, DONALD, FARLEY & KETCHUM,

By QUENTIN O. YOUNG,

Attorney for Respondent.

September 26, 1968.

Appendix.

Case Name Citation	District Court			Court of Appeals		
	For Em.	For N.L.R.B.	Holding	For Em.	For N.L.R.B.	Holding
Wyman-Gordon 65 L.R.R.M. 2763 68 L.R.R.M. 2483		⋈	Administrative Procedure Act inapplicable; Excelsior rule valid; Lists are evidence and within Board's jurisdiction to compel by subpoena	⋈		Excelsior rule invalid under Administrative Procedure Act
Hanes 63 L.R.R.M. 2513 66 L.R.R.M. 2264 384 F. 2d 188 Cert. den. 67 L.R.R.M. 2632 390 U.S. 950	⋈		District Court lacks jurisdiction to enforce subpoena		⋈	Excelsior rule does not violate sec. 9(c); sec. 7; sec. 8(a)(1). The lists are evidence and proper subject of subpoena
Crane Packing Co. 64 N.L.R.B. 2168 66 L.R.R.M. 2481 385 F. 2d 52		⋈	Lists are subject to subpoena powers of the Board despite other means of communication		⋈	Board entitled to subpoena lists since lists constitute "evidence"
Q-T Shirt Co. (Appeal pending) 67 L.R.R.M. 2356 279 F. Supp. 1	⋈		District Court lacks jurisdiction to enforce subpoena since information not necessary to Board election and since act impliedly precludes judicial enforcement in representation proceedings failing an unfair labor practice charge			
Beech-Nut Life Savers, Inc. 66 L.R.R.M. 2327 (Appeal pending) 274 F. Supp. 432	⋈		Excelsior rule valid despite failure to follow Administrative Procedure Act; lists constitute evidence under sec. 11 of Act			
British Auto Parts 64 L.R.R.M. 2641, 2786 (Appeal pending) 374 F. 2d 81 266 F. Supp. 368		⋈	Lists constitute evidence within meaning of Act; Excelsior rule does not violate employees' rights of privacy or interfere with their rights under sec. 7 of the Act; Excelsior rule valid			
Teledyne, Inc. 66 L.R.R.M. 2408 (Appeal pending)		⋈	Excelsior rule is valid; for reasonable exercise of Board's power, lists are subject to subpoena and enforcement by District Court			
Howell Refining Co. 69 L.R.R.M. 2032		⋈	Employer having supplied list may not challenge Excelsior rule; Court declined to follow Wyman-Gordon decision			
Duncan Foundry and Machine Works 67 L.R.R.M. 2515 67 L.R.R.M. 2516		⋈	Excelsior list subject to the subpoena powers of the Board under sec. 11(2) of the Act		⋈	Stay of District Court Order vacated
Wolverine Industries Division, Mid-State Metal Products, Inc. —Fed. Supp.— 64 L.R.R.M. 2187		⋈	Excelsior list constitutes evidence under sec. 11 of the Act			
Montgomery Ward & Co.	⋈		Excelsior list does not constitute			

CRANE PACKING Co. 64 N.L.R.B. 2168 66 L.R.R.M. 2481 385 F. 2d 52		X	Lists are subject to subpoena powers of the Board despite other means of communication		X	Board entitled to subpoena lists since lists constitute "evidence"
Q-T SHIRT Co. (Appeal pending) 67 L.R.R.M. 2356 279 F. Supp. 1	X		District Court lacks jurisdiction to enforce subpoena since information not necessary to Board election and since act impliedly precludes judicial enforcement in representation proceedings failing an unfair labor practice charge.			
BEECH-NUT LIFE SAVERS, INC. 66 L.R.R.M. 2327 (Appeal pending) 274 F. Supp. 432	X		Excelsior rule valid despite failure to follow Administrative Procedure Act; lists constitute evidence under sec. 11 of Act			
BRITISH AUTO PARTS 64 L.R.R.M. 2641, 2786 (Appeal pending) 374 F. 2d 81 266 F. Supp. 368		X	Lists constitute evidence within meaning of Act; Excelsior rule does not violate employees' rights of privacy or interfere with .their rights under sec. 7 of the Act; Excelsior rule valid			
TELEDYNE, INC. 66 L.R.R.M. 2408 (Appeal pending)		X	Excelsior rule is valid; for reasonable exercise of Board's power, lists are subject to subpoena and enforcement by District Court			
HOWELL REFINING Co. 69 L.R.R.M. 2032		X	Employer having supplied list may not challenge Excelsior rule; Court declined to follow Wyman-Gordon decision			
DUNCAN FOUNDRY AND MACHINE WORKS 67 L.R.R.M. 2515 67 L.R.R.M. 2516		X	Excelsior list subject to the subpoena powers of the Board under sec. 11(2) of the Act		X	Stay of District Court Order vacated
LVERINE INDUSTRIES DIVISION, MID-STATE METAL PRODUCTS, INC. —Fed. Supp.— 64 L.R.R.M. 2187		X	Excelsior list constitutes evidence under sec. 11 of the Act			
MONTGOMERY WARD & Co. —Fed. Supp.— 64 L.R.R.M. 2299	X		Excelsior list does not constitute evidence under sec. 11 of the Act			
SWIFT & Co. v. SOLIEN 66 L.R.R.M. 2038		X	Employer having consented to election may not obtain an injunction restraining Regional Director from holding election; Excelsior list is evidence under sec. 11 of the Act			
GROYNDIKE TRANSPORTATION INC. v. DAVIS	X		Excelsior rule invalid since adopted in violation of sec. 6 of the Act and in violation of the Administrative Procedure Act			
MAGNESIUM CASTING Co. v. HOBAN 68 L.R.R.M. 2765 —Fed. 2d—	X		District Court may enjoin Regional Director from certifying results of election where employer submitted an Excelsior list since Excelsior rule invalid under the Administrative Procedure Act		X	Employer having submitted Excelsior list waives right to object to Excelsior rule